IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-203.

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

MORDECAI ROSENFELD,
233 Broadway,
New York, New York. 10007

HAROLD E. KOHN,
AARON M. FINE,
ALLEN D. BLACK,
ARTHUR M. KAPLAN,
1700 Market Street,
Philadelphia, Pennsylvania. 19103

Attorneys for Petitioner.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
THE OPINIONS DELIVERED IN THE COURTS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROCEDURAL RULE INVOLVED	2
QUESTIONS PRESENTED FOR REVIEW	6
STATEMENT OF THE CASE	8
The Complaint	8
The Class Action	9
The District Court Hearings on Remand	10
The Class Notice	11
The Evidence of Defendants' Liability	12
The Court of Appeals Decision	13
The Petition for Rehearing in Banc	15
SUMMARY OF ARGUMENT	16
ARGUMENT	19
I. The Court of Appeals Had No Jurisdiction to Review the District Court's Orders Permitting the Action to Be Maintained as a Class Action	19
(a) The Court of Appeals Had No "Retained" Jurisdiction	20
(b) The Court of Appeals Had No "Final Order" Jurisdiction	21
II. Compelling Principles of Public Policy Sustain Petitioner's Right to Maintain This Action as a Class Action	25
III. The Court of Appeals Erred in Dismissing the Class Action on the Ground That Petitioner Could Not Pay for Individual Notice to More Than Two Million Class Members	29

INDEX (Continued).

Page

(a) Individual Notice Is Not Required by Due Process 29

(b) Individual Notice Is Not Required by Rule 23(c)(2) 33

(c) The Court of Appeals Failed to Consider Reasonable Alternatives for the Purpose of Satisfying Notice Requirements and Erred in Holding That Notice Is Required in 23(b)(1) or (2) Class Actions 35

IV. The Court of Appeals Erred in Holding That the District Court Was Without Authority to Allocate the Cost of Notice Between the Parties, on the Basis of a Preliminary Evidentiary Hearing on the Plaintiff's Probable Success on the Merits 38

V. The Court of Appeals Erred in Dismissing the Class as Unmanageable and Rejecting Out of Hand Any Possibility of Fluid Recovery 41

(a) The Class Action Is Manageable 41

(b) Fluid Class Recovery Stands on Firm Legal Ground 43

(c) Fluid Class Recovery Is a Legally Sound Remedy for Violation of the Exchange Act .. 49

(d) Fluid Recovery Is Appropriate Under Section 16 of the Clayton Act 51

VI. The Court of Appeals Has Unjustifiably Limited the Discretion of the District Court 52

CONCLUSION 55

APPENDIX TO PETITIONER'S BRIEF:

Fifth Amendment to the Constitution of the United States 56

Statutory Provisions 56

TABLE OF CASES CITED.

Page

Alaska Steamship Co. v. Federal Maritime Commission, 344 F. 2d 810 (9th Cir. 1965) 48

Amalgamated Workers Union of the Virgin Islands v. Hess Oil Virgin Islands Corp., 478 F. 2d 540 (3d Cir. 1973) 36, 37

Arkansas Education Association v. Board of Education, 446 F. 2d 763 (8th Cir., 1971) 28

Baird v. Franklin, 141 F. 2d 238 (2d Cir.), cert. denied, 323 U. S. 737 (1944) 49

Bebchick v. Public Utilities Commission, 318 F. 2d 187 (D. C. Cir., in banc), cert. denied, 373 U. S. 913 (1963) 47

Berland v. Mack, 48 F. R. D. 121 (S. D. N. Y. 1969) 32, 38, 39

Bigelow v. RKO Radio Pictures, 327 U. S. 251 (1946) 28

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U. S. 388 (1971) 49, 50

Bohms v. Gardner, 381 F. 2d 283 (8th Cir. 1967), cert. denied, 390 U. S. 964 (1968) 21

Bragalini v. Biblowitz, 1969-1970 Fed. Sec. L. Rep. ¶ 92,537 (S. D. N. Y. 1969) 38

Bright v. Philadelphia-Baltimore-Washington Stock Exchange, 327 F. Supp. 495 (E. D. Pa. 1971) 43

Byram Concretanks, Inc. v. Warren Concrete Products Co., 374 F. 2d 649 (3d Cir. 1967) 41

Caceres v. International Air Transport Association, 422 F. 2d 141 (2d Cir. 1970) 21, 22

Cinerama, Inc. v. Sweet Music, S. A., 482 F. 2d 66 (2d Cir. 1973) 24

City of New York v. International Pipe & Ceramics Corp., 410 F. 2d 295 (2d Cir. 1970) 21, 23

City of Philadelphia v. American Oil Co., Civil Action No. 647-68 (D. N. J.) 44

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1949) 23

Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P. 2d 732 (1967) 48

TABLE OF CASES CITED (Continued).

Page

Dickinson v. Burnham, 197 F. 2d 973 (2d Cir.), cert. denied, 344 U. S. 875 (1952) 50

Dolgow v. Anderson, 43 F. R. D. 472 (E. D. N. Y. 1968) .. 38

Esplin v. Hirshi, 402 F. 2d 94 (10th Cir. 1968), cert. denied, 394 U. S. 928 (1969) 28

Falk v. Dempsey-Tegeler & Co., Inc., 472 F. 2d 142 (9th Cir. 1972) 22

Farmer v. Arabian American Oil Co., 285 F. 2d 720 (2d Cir. 1960) 40

Feder v. Harrington, 52 F. R. D. 178 (S. D. N. Y., 1970) ... 39

Financial Services, Inc. v. Ferrandina, 474 F. 2d 743 (2d Cir. 1973) 24

Ford Motor Co. v. United States, 405 U. S. 562 (1972) 52

Fuentes v. Shevin, 407 U. S. 67 (1972) 40

Gerstle v. Continental Airlines, Inc., 466 F. 2d 1374 (10th Cir. 1972) 23

Gosa v. Securities Investment Co., 449 F. 2d 1330 (5th Cir. 1971) 22

Graci v. United States, 472 F. 2d 124 (5th Cir. 1973) 22

Grad v. Memorex Corp., 17 F. R. Serv. 2d 934 (N. D. Calif. 1973) 29

Greenfield v. Villager Industries, Inc., 483 F. 2d 824 (3d Cir. 1973) 53

Hackett v. General Host Corp., 455 F. 2d 618 (3d Cir.), cert. denied, 407 U. S. 925 (1972) 22, 25

Hammond v. Powell, 462 F. 2d 1053 (4th Cir. 1972) 37

Hanover Shoe Co. v. United Shoe Machinery, 392 U. S. 481 (1968) 28, 46

Hansberry v. Lee, 311 U. S. 32 (1940) 29, 30, 50

Huff v. N. D. Cass Company of Alabama, 17 F. R. Serv. 2d 934 (5th Cir. 1973) 40

Hughes Tool Co. v. Trans World Airlines, Inc., 409 U. S. 363, rehearing denied, 410 U. S. 975 (1973) 24, 40

TABLE OF CASES CITED (Continued).

Page

In Re Antibiotic Antitrust Actions, 333 F. Supp. 278 (S. D. N. Y. 1971), mandamus denied, 449 F. 2d 119 (2d Cir. 1971) 47

In re Nevada-Utah Mines & Smelters Corp., 204 Fed. 982 (2d Cir. 1913) 20

In Re Western Liquid Asphalt Cases, 1973 CCH Trade Cases, ¶ 74,733 (9th Cir. 1973) 47

International Business Machines Corp. v. United States, 480 F. 2d 293 (2d Cir. 1973) 25

International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., 351 F. Supp. 1153 (D. Hawaii 1972) 51

Interpace Corporation v. City of Philadelphia, 438 F. 2d 401 (3d Cir. 1971) 23

J. I. Case Co. v. Borak, 377 U. S. 426 (1964) 27, 49, 50

Jordan v. Weaver, 472 F. 2d 985 (7th Cir. 1973), cert. granted sub nom. Edelman v. Jordan, 37 L. Ed. 2d 396 52

Katz v. Carte Blanche Corporation, — F. 2d — (3d Cir. 1973), 17 FR Serv. 2d 279 (Petition For Rehearing In Banc granted, June 20, 1973) 52

Kahan v. Rosenstiel, 424 F. 2d 161 (3d Cir.) cert. denied, 398 U. S. 950 (1970) 28

Korn v. Franchard Corp., 443 F. 2d 1301 (2d Cir. 1971) ... 21

Lamarche v. Sunbeam Television Corp., 446 F. 2d 880 (5th Cir. 1971) 22

Lamb v. United Security Life Company, 1971-1972 Fed. Sec. L. Rep. ¶ 93,489 (S. D. Iowa 1972) 39

Mack v. General Electric Co., Civil Action No. 69-2653 (E. D. Pa., Order of September 7, 1971) 39

Market Street Railway Co. v. Railroad Commission, 28 Cal. 2d 363, 171 P. 2d 875 (1946) 48

Meredith v. Fair, 306 F. 2d 374 (5th Cir. 1962) 20

TABLE OF CASES CITED (Continued).

Page

Metro Homes, Inc. v. City of Warren, 19 Mich. App. 664 (1969), leave to appeal denied, 383 Mich. 761, cert. denied, 398 U. S. 959 (1970) 48

Miller v. Alexander Grant & Co., 1971-72 Fed. Sec. L. Rep. ¶ 93,287 (E. D. N. Y. 1971) 39

Miller v. Mackey International, Inc., 452 F. 2d 424 (5th Cir. 1971) 40

Mills v. Electric Auto-Lite Co., 396 U. S. 375 (1970) 27, 38, 43

Montgomery Ward & Co., Inc. v. Langer, 168 F. 2d 182 (8th Cir. 1948) 44, 50

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950) 32, 37

Olson v. The County of Sacramento, 79 Cal. Rep. 140 (Cal. Ct. App., 3d Dist. 1969) 48

Partain v. First National Bank of Montgomery, 59 F. R. D. 56, 62 (M. D. Ala. 1973) 38, 43

Perlman v. Feldman, 129 F. Supp. 162 (D. Conn. 1952), rev'd, 219 F. 2d 173 (2 Cir. 1955), on remand, 160 F. Supp. 310 (D. Conn. 1958) 49

Perma Life Mufflers v. International Parts Corp., 392 U. S. 134 (1968) 26

Philadelphia Electric Co. v. Westinghouse Electric Corp., 1964 CCH Trade Cases, ¶ 71,123 (E. D. Pa. 1964) 26

Porter v. Warner Holding Co., 328 U. S. 395 (1946) 52

Quinault Allottee Association & Individual Allottees v. United States, 453 F. 2d 1272 (Ct. Cl. 1972) 45

Schneider v. Electric Auto-Lite Company, 456 F. 2d 366 (6th Cir. 1972) 28

Schroeder v. City of New York, 371 U. S. 208 (1962) 32

SEC v. Golconda Mining Co., 327 F. Supp. 257 (S. D. N. Y. 1971) 46

SEC v. Manor Nursing Centers, Inc., 458 F. 2d 1082 (2d Cir. 1972) 44

TABLE OF CASES CITED (Continued).

Page

S. E. C. v. Texas Gulf Sulphur Co., 446 F. 2d 1301 (2d Cir.) 50

Smith v. Swormstedt, 57 U. S. 288 (1853) 29, 44, 50

Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) 40

Songy v. Coastal Chemical Corp., 469 F. 2d 709 (5th Cir. 1972) 22

State of Hawaii v. Standard Oil Co. of California, 405 U. S. 251 (1972) 27

State of Minnesota v. U. S. Steel Corp., 44 F. R. D. 559 (D. Minn. 1968) 38

State of West Virginia v. Chas. Pfizer & Co., 440 F. 2d 1079 (2d Cir.), cert. denied sub nomine Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U. S. 871 (1971) 33, 45, 46, 47

Walsh v. City of Detroit, 412 F. 2d 226 (6th Cir. 1969) 22

Weight Watchers of Philadelphia v. Weight Watchers International, 455 F. 2d 770 (2d Cir. 1972) 21

Weingartner v. Union Oil Company of California, 431 F. 2d 26 (9th Cir. 1970), cert. denied, 400 U. S. 1000 (1971) 22

West v. Zurhorst, 425 F. 2d 919 (2d Cir. 1970) 24, 41

Wilcox v. Commerce Bank of Kansas City, 474 F. 2d 336 (10th Cir. 1973) 54

Yaffe v. Powers, 454 F. 2d 1362 (1st Cir. 1972) 37, 43

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U. S. 100 (1969) 26, 51

STATUTES AND RULES CITED.

	Page
Clayton Act:	
Section 4, 15 U. S. C. § 15	8, 18, 46, 47, 50
Section 16, 15 U. S. C. § 26	8, 51
Judicial Code of the United States:	
28 U. S. C. § 1291	23
28 U. S. C. § 1291(a)	20
28 U. S. C. § 1292(b)	21, 25
National Traffic and Motor Vehicle Safety Act of 1966, 15 U. S. C. § 1402	41
Securities Exchange Act of 1934:	
Section 6, 15 U. S. C. § 78(f)	8, 18
Section 27, 15 U. S. C. § 78aa	8, 18
Sherman Act:	
Section 1, 15 U. S. C. § 1	8
Section 2, 15 U. S. C. § 2	8
Federal Rules of Civil Procedure, Rule 23	1, et seq.

CONSTITUTION CITED.

	Page
United States Constitution, Fifth Amendment	2

AUTHORITIES CITED.

Page

1973 Annual Report of the Director, Administrative Office of the United States Courts, pp. II-4, II-42 23

Burger, Report on the Federal Judicial Branch—1973, 59 A. B. A. Journal 1125 45

Hazard, The Effect of the Class Action Device Upon the Substantive Law, 58 F. R. D. 307 26

Homburger, State Class Actions and The Federal Rule, 71 Colum. L. Rev. 609 (1971) 32

Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356 31

Manageability of Notice and Damage Calculation in Consumer Class Actions, 70 Mich. L. Rev. 338 (1971) 31

Miller, Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3), 54 F. R. D. 501 .. 44

Miller, Problems of Giving Notice In Class Actions, 58 F. R. D. 313 .....31, 34, 37

U. S. Dept. of Transportation, Motor Vehicle Safety Defect Recall Campaigns, from January 1, 1971 to December 31, 1971 41

THE OPINIONS DELIVERED IN THE COURTS BELOW.

1. The opinion of the Court of Appeals of May 1, 1973, reversing the orders of the district court (Medina and Lumbard, Senior Circuit Judges, per Medina, J.) is reported at 479 F. 2d 1005 (A346). The opinion of Judge Hays, concurring in the result is reported *id.* at 1020 (A374).

2. The opinion of the Court of Appeals of May 24, 1973 denying rehearing in banc is reported *id.* at 1020-1 (A375). The concurring opinion of Judge Mansfield is reported *id.* at 1021 (A377). The dissent of Judge Hays is reported *id.* at 1021 (A377). The dissent of Judge Oakes (Judge Timbers concurring) is reported *id.* at 1021 *et seq.* (A377).

3. Prior opinions of the Court of Appeals are reported at 370 F. 2d 119, *cert. denied,* 386 U. S. 1035 (A104), and 391 F. 2d 555 (A110).

4. The opinions of the District Court are reported at 41 F. R. D. 147 (A93); 50 F. R. D. 471 (A164); 52 F. R. D. 253 (A199); and 54 F. R. D. 565 (A275).

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was entered on May 1, 1973. A timely petition for rehearing, containing a suggestion that the action be reheard in banc, was filed on May 11, 1973, and was denied on May 24, 1973. This Court granted certiorari on October 15, 1973. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROCEDURAL RULE INVOLVED.

The constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution. The rule involved is Rule 23 of the Federal Rules of Civil Procedure. The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2 and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, Sections 6 and 27 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78(f) and 78aa (the "Exchange Act"), and 28 U. S. C. §§ 1291 and 1292(b).

The text of Rule 23 is as follows:

Rule 23.

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class

the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the oppor-

tunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
As amended Feb. 28, 1966, eff. July 1, 1966.

• • •

The texts of the Fifth Amendment and the statutory provisions are printed in an Appendix at the end of this Brief. (Page references to that Appendix are designated —a.)

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals have jurisdiction to review the orders of the District Court allowing the action to be maintained as a class action and allocating the cost of notice?

2. Must a class action otherwise maintainable under Rule 23 be dismissed because the individual class representative cannot afford to pay for individual notice of its pendency to more than two million identifiable class members?

3. Is individual notice to more than two million identifiable class members required by due process or Rule 23, where the statute of limitations has run on the damage claims of the individual members, so that their interest in electing exclusion from the class is minimal?

4. Is due process satisfied in a class action maintained under Rule 23 by adequacy of representation, published notice and representative individual notice, rather than requiring individual notice to every identifiable class member?

5. Is notice of the pendency of a class action required in a class action maintained under Rule 23(b)(1) or (2)?

6. Does Rule 23 or due process preclude the District Court from allocating the cost of the class action notice among the parties, on the basis of the high probability of plaintiff's success on the merits, as determined in a preliminary evidentiary hearing?

7. Did the Court of Appeals err in holding as a matter of law that the class action was unmanageable?

8. Did the Court of Appeals err in rejecting out-of-hand a possible form of class action relief under which

defendants might be required to disgorge the fruits of their antitrust and Exchange Act violations under the so-called "fluid recovery" theory?

9. Did the Court of Appeals apply an improper standard of review in usurping the District Court's broad discretion in making a class action determination under Rule 23?

STATEMENT OF THE CASE.

Petitioner seeks review of the decision and opinion of the United States Court of Appeals for the Second Circuit, dated May 1, 1973, reversing the class action orders of the District Court, and dismissing the case as a class action.

The Complaint.

The complaint alleges that in the period 1962-1966 the two odd-lot brokerage firm defendants (Carlisle & Jacquelin and DeCoppet & Doremus, hereinafter "the odd-lot defendants"), who controlled ninety-nine percent of the odd-lot business, illegally fixed the odd-lot differential charged to the investing public at an excessive level in violation of the federal antitrust laws, and that such price-fixing was done with the acquiescence of the defendant New York Stock Exchange (hereinafter the "Exchange") in disregard of its regulatory and fiduciary duties to investors, in violation of the Securities Exchange Act of 1934 ("Exchange Act").[1] The Complaint requests treble damages and injunctive relief for defendants' antitrust violations, and damages and injunctive relief against the Exchange for violation of the Exchange Act. The District Court's jurisdiction was based on 28 U. S. C. § 1337. The action arises under Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, and under Sections 6 and 27 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78(f) and 78aa.

1. Odd-lots are shares traded in lots of less than a hundred. Shares traded in multiples of a hundred are round lots. During the period 1962-1966 the odd-lot differential (a surcharge imposed on odd-lot transactions in addition to the standard commission) was 12½ cents per share on all stocks selling below $40 per share and 25 cents per share on all stocks selling at or more than $40 per share; on July 1, 1966 the "break point" was raised to $55 per share.

The Class Action.

The action was brought on May 2, 1966 as a class action on behalf of all persons who were forced to pay the differential. On September 27, 1966, the District Court dismissed the action as a class action (A93). Plaintiff appealed the dismissal to the Court of Appeals for the Second Circuit. Defendants' motion to dismiss the appeal as not being taken from a final order was denied, on the ground that dismissal of the class action was the "death knell" of the entire action, since for all practical purposes it would terminate the litigation, because plaintiff's individual stake, $70, was so small (A104). This Court denied certiorari. 386 U. S. 1035. By opinion dated March 8, 1968, the Court of Appeals reversed the District Court's original dismissal of the action as a class action and held that the suit was in all respects maintainable as a class action under Rule 23(a) and 23(b)(3)[2] except that a further evidentiary hearing was required with respect to the issues of "notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper" (A133). The case was remanded with directions to hold such a hearing. The Court of Appeals stated:

> "Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (A112).

---

2. The Court of Appeals held that the class action was not maintainable under Rule 23(b)(1) or (b)(2).

The Court further stated:

> ". . . courts in the past have been able to fashion procedures in order to deal with the distribution of millions of dollars in damages to thousands of small claimants." (A127).

Moreover, the Court held that Rule 23 "should be given a liberal rather than a restrictive interpretation." (A119).

The District Court Hearings on Remand.

On remand the District Court held two sets of hearings. The first dealt with whether the case could be maintained as a class action. On the basis of a complete record, in which most of the facts were stipulated, the District Court held that the prerequisites to maintenance of a class action were satisfied.

The District Court, heeding the Court of Appeals' admonition that Rule 23 was intended "to provide a thoroughly flexible remedy" stated that: "Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof . . .", deeming it "appropriate . . . to consider some kind of 'fluid class recovery', i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial planning stage, an inflexible mold of recovery running to specific class members." "Fluid recovery" would be accomplished by establishing a fund equivalent to the amount of unclaimed damages and reducing the odd-lot differential on future transactions in an amount determined reasonable by the Court until the fund was depleted. The District Court emphasized, however, that: "Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for

distribution of the unclaimed remainder." (A217). The District Court also found, by analyzing the record in other class actions, that the expense of administration would not engulf the prospective recovery (A217-8).

The Class Notice.

The District Court held that the requirements of due process and Rule 23(c)(2) would be satisfied by publication in the national edition of the Wall Street Journal and in New York, San Francisco and Los Angeles newspapers, supplemented by mailing of an initial individual notice to the most active members of the class, followed by more extensive notice in the event that the defendants were found liable. The court accordingly ordered individual notice to be sent "to the approximately 2,000 or more class members who had ten or more transactions during the relevant period."[3] This notice program was tailored to the Court of Appeals' suggestion that the notice effort should be concentrated upon those class members who may have "enough of a stake in the proceedings to justify personal intervention . . ." (A132). The District Court further directed: "In order to insure adequate representation and to gain more information about the nature of the class, individual notice shall also be mailed to 5 000 other class members selected at random from the 2,000,000 persons and firms who are identifiable." In addition, the District Court noted that plaintiff had offered to send copies of the notice to all member firms of the Exchange and to all commercial banks with large trust departments. Plaintiff also suggested that the notice could be included in the confirmations and monthly statements sent to their customers by the member firms.

3. This figure was based on a representative sample of four of the fourteen wirehouses which had such tapes.

Having decided that the requirements of Rule 23 for maintenance of a class action were satisfied, the District Court proceeded to determine who should bear the cost of notice to the class, reasoning: "If the expense of notice is placed upon plaintiff, it would be the end of a possibly meritorious suit, frustrating both the policy behind private antitrust actions and the admonition that the new Rule 23 is to be given a liberal rather than a restrictive interpretation, Eisen II at 563. On the other hand, if costs were arbitrarily placed upon defendants at this point, the result might be the imposition of an unfair burden founded upon a groundless claim" (A225-6). As a solution the court held a preliminary hearing for the purpose of determining whether plaintiff's chance of success on the merits was sufficient to justify imposing the cost of notice on the defendants.

The Evidence of Defendants' Liability.

On the basis of a record, most of which consisted of the defendants' own documents which they put in evidence themselves, the District Court found that plaintiff and the class "are more than likely to prevail at trial or upon a motion for summary judgment" (A289-90). The court found that plaintiff had made a strong showing that the odd-lot defendants had engaged in price fixing, market division, and other anti-competitive practices, none of which was exempt from the antitrust laws. Counsel for the odd-lot defendants admitted that the differential was the result of "most intense negotiation between the odd-lot houses among themselves. . . ." (A274). The two firms always charged exactly the same differential, and when the differential was changed, each firm changed it identically at the identical moment. They claimed that they were entitled to "a special exception" that made compliance with the fed-

eral antitrust laws unnecessary. The District Court found that no special exception was warranted. Indeed, no such defense had been pleaded.

The District Court likewise found that the plaintiff had presented "excellent evidence" of liability against the Exchange, resulting primarily from the Exchange's failure to prevent the odd-lot defendants from charging their excessive differential to the public (A289). Accordingly the District Court imposed 90% of the total notice cost of $21,720 on the defendants (A290).

The Court of Appeals Decision.

Following the District Court's order allocating ninety percent of the cost of notice to them, the defendants obtained an order from the Court of Appeals on May 1, 1972 (over plaintiff's objection that the Court of Appeals had no jurisdiction to enter such an order) directing the Clerk of the District Court to certify and transmit the record for review (A314). Thereafter, defendants also filed a notice of appeal from the orders of the District Court (A315). Plaintiff moved to dismiss the appeal as not being taken from a final order. The motion was denied on June 29, 1972 (A317).

On May 1, 1973 the Court of Appeals (Medina and Lumbard, Senior Circuit Judges; Hays, Circuit Judge, concurring in the result) reversed the orders of the District Court which had sustained the prosecution of the case as a class action, and dismissed the case as a class action.

The Court of Appeals held:

1. It had jurisdiction to review the order of the District Court, because all orders sustaining class actions are appealable (A348).

2. In virtually every class action—whether brought under Rule 23(b)(1), (b)(2) or (b)(3)—and whether plaintiff's claim appears to be meritorious or not—plaintiff must send and pay for individual notice to every class member who can be identified (A364).

3. The District Court has no discretion under Rule 23 to fashion an equitable remedy appropriate to the kind of wrong and the type of class involved; hence, even the theoretical possibility of a "fluid class" recovery was rejected (A370).

4. In addition to rejecting the "fluid class theory", the Court held the class action unmanageable, even though 56% of the challenged transactions are recorded on computer tapes, so that class members could be repaid directly and precisely with regard to those transactions (A367, A184-5).

5. Any kind of newspaper notice is "a farce" (A368-9); due process and Rule 23 require that every class member must receive individual notice of the pendency of the action.

6. The merits of the case are irrelevant; no matter how apparent and gross the wrong, a class action cannot be maintained unless plaintiff first gives and pays for individual notice pursuant to Rule 23(c)(2). The District Court has no jurisdiction either to evaluate the merits of plaintiff's claim to allocate the cost of notice (A367).

Judge Hays concurred in the result, "unable to accept the ruling of the district court requiring the defendants to pay ninety percent of the cost of notice, since, if the defendants should finally prevail, they would not be reimbursed for this expenditure." Judge Hays was presumably referring only to the notice as ordered by the District Court. He did not join the majority in holding that 2,000,000 individual notices were required (A374).

The Petition for Rehearing in Banc.

Plaintiff petitioned the Court of Appeals for a rehearing in banc. Five members of the Court (per Judge Kaufman with Judges Friendly, Feinberg, Mansfield and Mulligan concurring) voted to deny rehearing only because "the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction. . . . [W]e wisely speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration." (A376).

Judges Hays, Oakes and Timbers voted for a rehearing in banc. Judge Oakes (with Judge Timbers concurring) filed an opinion which states:

1. "The case is extremely important and vitally affects class actions, particularly environmental and consumer actions, affecting large numbers of citizens." (A378).

2. "The panel opinion reaches a result which is very doubtful to say the least; on its face the opinion appears to nullify much of Fed. R. Civ. P. 23." (A378).

3. "The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, unhampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer." (A379).

4. Notice by publication is not "a farce", but is rather, "highly effective" (A384).

5. The panel opinion "not merely ossifies, but destroys" class actions, an important remedial device. (A384).

SUMMARY OF ARGUMENT.

The Court of Appeals had no jurisdiction to review the orders of the District Court permitting Petitioner to maintain this action as a class action, and prescribing the form and allocating the cost of notice to the class. Having previously reversed the District Court's order dismissing the class action and remanded the case, the Court of Appeals relinquished jurisdiction. It could not "retain" jurisdiction or regain jurisdiction in the absence of a final order of the District Court or a properly certified interlocutory appeal. There was neither a final order, nor a certification. By holding that all class action determinations are appealable, the Second Circuit invites a further increase in the already inordinate burdens on the Courts of Appeals.

Fundamental principles of public policy support maintenance of this class action. Petitioner serves as a "private attorney general" in vindicating the policies of antitrust and securities law enforcement, including the policy that wrongdoers shall not retain the fruits of their violations. Injury to the class arising from violation of those laws can be effectively redressed only by recourse to Rule 23, where the claims are too small to warrant individual litigation.

The Court of Appeals erred in holding that individual notice is required to more than 2,000,000 identifiable class members and that Petitioner must pay for such notice, or suffer dismissal of the class action. Due process does not require individual notice at every step in class actions, but rather is satisfied by fairness and adequacy of representation, with such notice as is reasonable under the circumstances. The District Court found that plaintiff would fairly and adequately represent the class, a finding which the Court of Appeals did not disturb.

Rule 23(c)(2) prescribes "the best notice practicable under the circumstances including individual notice to all

members who can be identified through reasonable effort," in 23(b)(3) class actions. Such determinations lie within the sound discretion of the District Court, which was not abused in this case. The class action is also maintainable under 23(b) (1) or (2), for which no notice requirement is prescribed by the Rule. The notice prescribed by the District Court, including publication and selected individual notice satisfied the requirements both of due process and Rule 23.

At this stage of the case, for the purpose of determining the underlying common questions of liability, which the Court of Appeals has held are predominant within the meaning of Rule 23(b)(3), individual notice to every identifiable class member is not essential. The principal purpose of such notice is to give class members an opportunity to "opt out" of the class, so as not to be bound by the judgment. Since the Court of Appeals has found that their interest in electing exclusion from the class is minimal, because, among other reasons, the statute of limitations has run on damage claims of the individual class members, individual notice is not important at this juncture. If liability is determined in favor of the class, broader notice can be given to individual claimants.

Rule 23 provides that the court, not the parties, shall direct notice to the class. It does not impose that burden on the class representative, nor does it provide that ability to give notice is a prerequisite to maintenance of a class action. The Court may allocate the cost of notice among the parties. The preliminary evidentiary hearing held by the District Court to determine Petitioner's probability of success on the merits was an appropriate way of determining the allocation and did not violate due process. If Respondents are found liable, the cost of broader notice to elicit claims of class members can be imposed on them.

The Court of Appeals erred in holding that the class action is unmanageable. The District Court correctly held that the class action is manageable and that the likely recovery will not be overwhelmed by costs of administration. The District Court contemplated that claims of individual class members would be satisfied to the extent filed, but also properly held that a "fluid recovery" remedy could be considered, whereunder damages not individually claimed could be used to reduce the odd-lot differential in the future for the benefit of odd-lot traders. While "fluid recovery" was not ripe for determination on appeal, since it was only tentatively proposed by the District Court, its ultimate adoption would fall within the equity powers of the court. It is appropriate as a form of relief both under the Clayton Act and the Exchange Act. The Court of Appeals erred in holding that it violates due process and is "illegal."

The Court of Appeals erred in usurping the District Court's broad discretion.

ARGUMENT.

I. The Court of Appeals Had No Jurisdiction to Review the District Court's Orders Permitting the Action to Be Maintained as a Class Action.

The 1968 opinion of the Court of Appeals, reversing dismissal of the class action, concludes:

> "Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper." (A133).

On March 8, 1968, the following judgment was entered by the Clerk of the Court of Appeals:

> ". . . it is now hereby, ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for the proceedings in accordance with the opinion of this court with costs to the appellant." (A138).

The mandate was issued on April 9, 1968. The District Court held the hearings required by the Court of Appeals and reinstated the class action which it had originally dismissed. Thereupon, Respondents moved in the Court of Appeals for an order directing the Clerk of the District Court to certify and transmit the record for review, claiming that the Court of Appeals, having "retained" jurisdiction, had authority to so order (A309).

The motion was granted over Petitioner's objection that the Court of Appeals had relinquished jurisdiction when it reversed and remanded (A314).

Respondents also filed a notice of appeal under 28 U. S. C. § 1291(a) from the orders of the District Court of April 7, 1971 and April 4, 1972 ,which allowed the class action and allocated the cost of notice (A315). Petitioner moved to dismiss that appeal on the ground that it was not taken from a final order (A317). The motion was denied (A322).

In its opinion on the merits, reversing the above orders of the District Court, the Court of Appeals stated: ". . . in this case we did not in our disposition of the prior appeal intend to relinquish to the District Court any jurisdiction to pass on the merits of the case but only to decide if the requirements of amended Rule 23 had been met." (A367).

(a) The Court of Appeals Had No "Retained" Jurisdiction.

The words "we retain jurisdiction" in the opinion could not and did not effectively preserve the jurisdiction of the Court of Appeals, in face of the court's own judgment that the order of the District Court had been reversed and the case remanded, and the return of the mandate to the District Court. Once an appellate court affirms or reverses the lower court's decision and sends down its mandate, "[t]he case is no longer in this court." *In re Nevada-Utah Mines & Smelters Corp.*, 204 Fed. 982, 983 (2d Cir. 1913), and "the Court's control over the judgment below comes to an end", *Meredith v. Fair*, 306 F. 2d 374, 376 (5th Cir. 1962).

The practicalities support these holdings. Respondents argued that the Court of Appeals could somehow re-

serve jurisdiction in 1968 to hear an appeal that might be presented to it many years in the future from orders of the District Court that had not yet been made. Since jurisdictional statutes are strictly construed, *Bohms v. Gardner*, 381 F. 2d 283 (8th Cir. 1967), *cert. denied*, 390 U. S. 964 (1968), appellate jurisdiction cannot be based on such speculative grounds.

Reversal and remand of the case is inconsistent with retention. The Court of Appeals, in the opinion now under review, expressly recognized that it had intended "to relinquish jurisdiction . . . to decide if the requirements of amended Rule 23 had been met."[4] (A367).

(b) The Court of Appeals Had No "Final Order" Jurisdiction.

With one narrow exception,[5] the Courts of Appeals which have considered the question, including the Second Circuit prior to the *Eisen* decision now under review, have been unanimous that class action determinations are not final orders, and are not subject to interlocutory appeal, absent certification under 28 U. S. C. § 1292(b). *Weight Watchers of Philadelphia v. Weight Watchers International*, 455 F. 2d 770 (2d Cir. 1972); *Korn v. Franchard Corp.*, 443 F. 2d 1301 (2d Cir. 1971); *City of New York v. International Pipe & Ceramics Corp.*, 410 F. 2d 295 (2d Cir. 1970); *Caceres v. International Air Transport Associa-*

4. The anomaly created by the Court of Appeals "retaining" jurisdiction is evidenced by Respondents' characterization of themselves in their Brief in that Court as "Defendants-Appellees." They had been Appellees in 1968. But surely, when the District Court decided against them on remand, they were no longer Appellees in seeking reversal.

5. The exception was created by the Second Circuit's holding on the first *Eisen* appeal (Eisen I), from dismissal of the class action, that the appeal would be allowed where its denial meant the "death knell" of the action (A104).

tion, 422 F. 2d 141 (2d Cir. 1970); *Hackett v. General Host Corp.,* 455 F. 2d 618 (3d Cir.), *cert. denied,* 407 U. S. 925 (1972); *Graci v. United States,* 472 F. 2d 124 (5th Cir. 1973); *Songy v. Coastal Chemical Corp.,* 469 F. 2d 709 (5th Cir. 1972); *Gosa v. Securities Investment Co.,* 449 F. 2d 1330 (5th Cir. 1971); *Lamarche v. Sunbeam Television Corp.,* 446 F. 2d 880 (5th Cir. 1971); *Walsh v. City of Detroit,* 412 F. 2d 226 (6th Cir. 1969); *Falk v. Dempsey-Tegeler & Co., Inc.,* 472 F. 2d 142 (9th Cir. 1972); *Weingartner v. Union Oil Company of California,* 431 F. 2d 26 (9th Cir. 1970) *cert. denied,* 400 U. S. 1000 (1971).

Rule 23(c)(1) provides: "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." Rule 23(d) provides: "In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action that notice be given in such manner as the Court may direct to some or all members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses or otherwise to come into the action; . . . The orders may be combined with an order under Rule 16, and may be amended or altered as may be desirable from time to time." The Advisory Committee commented as follows: "A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound." 39 F. R. D. at 104.

Thus, an order sustaining a class action is tentative, and not a final order, *Walsh v. City of Detroit, supra.* Rule 23 expressly contemplates continuing jurisdiction and dis-

cretion in the District Court, dispelling any notion that a class action order is final.[6]

Against this unanimity of authority, the Court of Appeals in *Eisen* held the orders of the District Court appealable under the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), concluding that: "An order sustaining a class action allegation clearly involves issues 'fundamental to the further conduct of the case;' . . . the order is also separable from the merits of the case. . . ." The holding invites appeals in every class action, imposing a great new burden on the beleaguered Courts of Appeals.[7]

This Court held in *Cohen, supra,* that 28 U. S. C. § 1291 does not permit appeals from decisions "where they are but steps towards final judgment in which they will merge . . . . [and are not] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U. S. at 546. The Court

---

6. In *City of New York v. International Pipe & Ceramics Corp., supra,* the Second Circuit dismissed as interlocutory an appeal from an order denying class action status. The cases were then transferred to the United States District Court for the Eastern District of Pennsylvania, which ordered that the actions could proceed as class actions. Defendant sought to challenge the order by writ of mandamus, which was denied by the Third Circuit, *Interpace Corporation v. City of Philadelphia,* 438 F. 2d 401 (3d Cir. 1971), relying on the provision of Rule 23(c)(1), that a class action order may be altered or amended before the decision on the merits. See also *Gerstle v. Continental Airlines, Inc.*, 466 F. 2d 1374, 1377 (10th Cir. 1972).

7. By June 30, 1973, a total of 10,456 cases were on the dockets of the Courts of Appeals, 245% above the 1962 level of 3,031 cases. On a per judgeship basis, national filings have increased 96% over 1966 and nearly 200% over 1961. *1973 Annual Report of the Director,* Administrative Office of the United States Courts, pp. II-4, II-42.

further stated: "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." 337 U. S. at 546.

Since its May 1, 1973 decision in *Eisen*, another panel of the Second Circuit has held: "The final judgment rule is designed not merely to prevent an appeal on an *issue* concerning which the trial court has not yet made up its mind beyond possibility of change but also to eliminate the need for separate appellate consideration of different elements of a single claim. The burgeoning loads of the courts of appeals mandate strict adherence to this salutary policy." *Cinerama, Inc. v. Sweet Music, S. A.*, 482 F. 2d 66, 70 (2d Cir. 1973). Under these standards the orders sustaining the class action were not appealable.

The District Court's order that Respondents pay ninety percent of the cost of notice to the class is no less a "step towards final judgment" than, and no different in its effect from, an order refusing to vacate an attachment, which the Second Circuit has consistently held to be interlocutory and not appealable even though the damages could well exceed the attachment bond. *West v. Zurhorst*, 425 F. 2d 919 (2d Cir. 1970). *Cf. Financial Services, Inc. v. Ferrandina*, 474 F. 2d 743 (2d Cir. 1973). Many interlocutory rulings may appear momentous when made, in their relationship to the future conduct of a particular lawsuit or in the burdens or disadvantages they impose on a party. Those considerations do not make such rulings appealable of right.[8] Adequate alternative appellate remedies, which they chose to

8. In *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U. S. 363, *rehearing denied*, 410 U. S. 975 (1973), Hughes argued in its petition for certiorari that compliance with the discovery order of the District Court would have cost $5,000,000. It suffered a

ignore, were available to Respondents, including application for certification under the Interlocutory Appeals Act of 1958, 28 U. S. C. § 1292(b), or mandamus. Unchecked expansion of the Cohen doctrine is especially unnecessary in view of such post Cohen alternatives. See *Hackett v. General Host Corporation, supra,* 455 F. 2d at 624.

Indulging Respondents in piecemeal review has enabled the Court of Appeals to make sweeping statements on issues not ripe for review. For example, it has rejected out of hand any possibility of "fluid class recovery", a remedy which the District Court had not definitively decided to apply, but rather kept open, so that the court would not "... adopt, at this initial, planning stage, an inflexible mode of recovery running to specific class members." The District Court recognized that: "Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for distribution of the unclaimed remainder."

The appellate jurisdiction of the Court of Appeals should be restored to its proper bounds. Its decision reversing the orders of the District Court sustaining the class action should be set aside.

II. Compelling Principles of Public Policy Sustain Petitioner's Right to Maintain This Action as a Class Action.

In the debates preceding enactment of the Clayton Act, Senator Borah said: "There could be no safer guardian for

---

8. (Cont'd.)

default judgment rather than comply. On January 23, 1963 the Court of Appeals dismissed an appeal from the discovery order as interlocutory. In *International Business Machines Corp. v. United States,* 480 F. 2d 293, 298 (2d Cir. 1973) (in banc), IBM was not allowed to appeal, under the doctrine of Cohen, an order requiring disclosure of documents which it claimed were protected by the attorney-client privilege, an irremediable ruling once disclosure is made.

the Sherman antitrust law than the hundreds and thousands of people who are injured by these monopolies if the law were made easy of enforcement so far as they are concerned." 51 Cong. Rec. 15986 (1914). The hundreds and thousands have become hundreds of thousands, and indeed, millions.[9] Without Rule 23, if their individual damages are too small to sustain the expense and burden of protracted litigation, they have no effective access to the courts for redress of their wrongs. In contrast, victims of antitrust violations who have the resources to sue individually or have enough at stake to make it worth while for counsel to take their cases do have effective access. See, *e.g., Philadelphia Electric Co. v. Westinghouse Electric Corp.,* 1964 CCH Trade Cases, ¶ 71,123 (E. D. Pa. 1964). The 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure assured that class action remedies would be effective in cases of mass injuries to small claimants arising out of violations of law falling within the jurisdiction of the federal district courts.

In the case of antitrust and securities law violations availability of the Rule 23 class action is especially appropriate, fortifying the high public purpose inherent in private enforcement of those laws. Treble damage plaintiffs act as private attorneys general in the scheme of antitrust enforcement. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U. S. 100, 131 (1969); *Perma Life Mufflers v. International Parts Corp.,* 392 U. S. 134, 138-9 (1968). Private plaintiffs in federal securities law cases fulfill the same

9. ". . . [T]he occasions generating the class suits . . . [have become] mass production events . . . . So with the securities cases. They also involve mass production wrongs, rather than single instances like their original prototype." Hazard, *The Effect of the Class Action Device Upon the Substantive Law,* 58 F. R. D. 307, 308. The Penn Central, Equity Funding and National Student Marketing Cases are three recent examples of such mass production wrongs.

function. *J. I. Case Co. v. Borak,* 377 U. S. 426, 432 (1964); *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375, 382 (1970). Rule 23 is ideally suited to enhance those ends, as this Court recognized in *State of Hawaii v. Standard Oil Co. of California,* 405 U. S. 251 (1972). Hawaii had argued that:

> ". . . the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and [that] . . . denying Hawaii the right to sue for injury to her quasi-sovereign interests . . . [would therefore] allow antitrust violations to go virtually unremedied . . ."

This Court responded:

> "Private citizens are not as powerless, however, as the State suggests.
>
> "Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U. S. C. §1337; 15 U. S. C. §15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." 405 U. S. at 265-6.

Under the decision of the Court of Appeals, the victims of the odd lot dealers' antitrust violations and the Exchange's violation of the Exchange Act have been rendered completely powerless. Indeed, the first time that it dealt with this case, the Court of Appeals recognized that: "Dismissal of the class action . . . will irreparably harm Eisen and all others similarly situated, for, as we have already noted, it will, for all practical purposes terminate the litigation." (A106-7). In its second opinion, reversing the

District Court's dismissal of the class action, the Court of Appeals adhered to the view that "the only feasible way to litigate these claims is by a class action." (A125-6). At the same time the Court then recognized that: "Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (A112).[10] The third opinion of the Court of Appeals has swept that all aside. The courthouse doors are barred to the class, despite the District Court's finding that they have a high probability of success on the merits. If the decision of the Court of Appeals is allowed to stand, Respondents will have accomplished a result which this Court has previously refused to countenance whereby ". . . those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them." *Hanover Shoe Co. v. United Shoe Machinery*, 392 U. S. 481, 494 (1968).[11]

The ramifications of dismissal of this class action were forcefully stated by Judge Oakes, dissenting from denial of rehearing in banc in the Court of Appeals, as follows:

---

10. The Court held that "the new rule should be given a liberal rather than a restrictive interpretation . . ." (A119). Other Circuits are in full accord: *Esplin v. Hirshi*, 402 F. 2d 94, 101 (10th Cir. 1968), *cert. denied*, 394 U. S. 928 (1969); *Arkansas Education Association v. Board of Education*, 446 F. 2d 763, 768 (8th Cir., 1971); *Schneider v. Electric Auto-Lite Company*, 456 F. 2d 366, 370 (6th Cir. 1972); *Kahan v. Rosenstiel*, 424 F. 2d 161, 169 (3d Cir.) *cert. denied*, 398 U. S. 950 (1970).

11. *Hanover Shoe* followed the holding in *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 265 (1946), which reaffirmed that, "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done."

> "The case accordingly affects adversely much consumer and environmental litigation, as well as all antitrust and other claims by numbers of little people for small amounts. The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, unhampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer. The panel opinion as I read it tells polluters that they are pretty safe from class actions because even if a whole city is blanketed in smoke or its water supply contaminated, the plaintiffs can never advance the money for notices to, say, all the people in the city phone book, who certainly are identifiable. I will not belabor the point of importance." (A379)

The *Eisen* decision can only ". . . encourage corporations to commit grand acts of fraud instead of small ones with the thought of raising the spectre of unmanageability to defeat the class action." *Grad v. Memorex Corp.*, 17 F. R. Serv. 2d 934 (N. D. Calif. 1973). The class action is rooted in equity. *Hansberry v. Lee*, 311 U. S. 32, 41 (1940); *Smith v. Swormstedt*, 57 U. S. 288 (1853). Equity would be ill served by defeat of the Eisen class.

III. The Court of Appeals Erred in Dismissing the Class Action on the Ground That Petitioner Could Not Pay for Individual Notice to More Than Two Million Class Members.

(a) Individual Notice Is Not Required by Due Process.

In its 1968 opinion dealing with the merits of the class action issue, the Court of Appeals held that: "Under cer-

tain circumstances published notice may amount to the 'best notice practicable,' particularly where requirement of a different form of notice would, in effect, prevent potentially meritorious claims from being litigated. In this connection we must note that in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 . . . (1950), the party required to furnish individual notice was a large banking institution and not a small individual claimant." (A132). In its 1973 opinion, the Court granted that: "Notice by publication has been sanctioned as consistent with due process of law under certain circumstances, . . ." again citing *Mullane*, but held that: "Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce." (A368-9).

To the extent that the Court implies that individual notice to every identifiable class member in the circumstances of this case is a requirement of due process, it is in error. In *Hansberry v. Lee, supra,* this Court held that the adequacy of representation in a class action is the hallmark of due process. As Judge Oakes stated in his dissent:

> "All that the due process clause requires is a procedure that 'fairly insures the protection of the interests of absent parties who are to be bound by [the judgment].' Hansberry v. Lee, 311 U. S. 32, 42 . . . (1940) (not cited by panel decision). See Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, 313-14 . . . (1950); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1960). See also C. Wright, supra at 313; Kaplan, supra, 81 Harv. L. Rev. at 391-92. But cf. Eisen II, 391 F. 2d at 368-69. The Advisory Committee is a respectable body of procedural experts who did not consider individualized notice to all or a certain percentage of class members a

prerequisite to the maintenance of a Rule 23 class action as a constitutional (or extraconstitutional) requirement. Advisory Committee Notes, 28 U. S. C. A., Rule 23 Supplementary Note at 302. The commentators generally agree. Assuming vigorous representation of the class's interests by the representative plaintiff (which is not in issue here), notice by publication to unidentifiable class members is constitutionally sufficient. Mullane v. Central Hanover Bank and Trust Co., supra, 339 U. S. at 314. A scheme of notice by publication (with costs perhaps taxed to the defendants) in financial journals of wide circulation—the Wall Street Journal, Business Week, Barron's, the New York Times financial section, and the like—would reach most of the class." [12]

Judge Oakes' analysis is particularly appropriate in the circumstances of this case. The statute of limitations has run on damage claims by class members.[13] No one but Eisen has brought suit. The Court of Appeals in its 1968

12. "To a substantial degree, Judge Tyler's attitude toward the policy behind the notice requirement of Rule 23(c)(2) and his specific plan for providing notice reflect the prevailing consensus of the commentators." *Manageability of Notice and Damage Calculation in Consumer Class Actions,* 70 Mich. L. Rev. 338, 355 (1971). See also Miller, *Problems of Giving Notice In Class Actions,* 58 F. R. D. 313. Professor Benjamin Kaplan (now a Justice of the Supreme Judicial Court of Massachusetts), Reporter to the Advisory Committee on Civil Rules from its organization in 1960 to July 1, 1966 has pointed out that it will not be practicable to give notice under (c)(2) which will reach each member of the class in all cases "but when large numbers of people are dealt with, perfect notice, while on the one hand hard to obtain becomes on the other hand unnecessary because of the probability that some individuals who are representative of differing opinions within the group (if in fact such differences exist) will in fact be reached and will speak up." Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 396.

13. Defendants pleaded the statute of limitations as a defense in their answers to the complaint.

opinion was satisfied that: ". . . the present case appears to fall within that class of cases in which 'the interests of individuals in conducting separate lawsuits' are more 'theoretic than practical' . . ." a belief ". . . reinforced by the fact that there is no other pending litigation dealing with the subject matter of this suit." (A126).

In such circumstances, a prime purpose of the notice requirement of Rule 23(c)(2), to provide an opportunity for class members to opt out of the class, is of little significance. "From a functional point of view, the need for notice and for the privilege to opt-out seems minimal in cases where individual prosecution is economically infeasible and, as a consequence, the class member's interest in controlling the prosecution or defense of a separate action is only theoretical. As a practical matter, the individual member in such cases will rarely have a rational basis for opting out." Homburger, *State Class Actions and The Federal Rule,* 71 Colum. L. Rev. 609, 637 (1971). As Judge Mansfield noted in *Berland v. Mack,* 48 F. R. D. 121, 129 n. 3 (S. D. N. Y. 1969), class members in (b)(3) actions rarely opt out, particularly where the individual's stake is small.

In *Mullane v. Central Hanover Bank and Trust Co.,* 339 U. S. 306 (1950), individual notice was important, because there were potentially adverse interests between the bank, filing its trust account, and the beneficiaries, and between different classes of beneficiaries. Eisen and the class members he seeks to represent have no such conflict. Their interests are identical in establishing Respondents' liability. Divergence, if any, would not arise prior to determination of liability and creation of a fund for the benefit of the class. At that time, the question of what further notice might be required or desirable, might be quite different. A broader notice might then be in order. Likewise, *Schroeder v. City of New York,* 371 U. S. 208 (1962) is

plainly distinguishable, since no one shared and represented the plaintiff's interest against the City's taking of her property. In contrast, Eisen, who is an adequate representative of the class, is seeking to obtain a recovery in the interest of the class.

As another panel of the Second Circuit stated, approving notice by publication in a class action:

> "There are no precise rules as to what constitutes adequate notice, and the due process standards have been held to vary depending on the circumstances of each case. . . . The Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 . . . (1949) noted: 'This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning.'" *State of West Virginia v. Chas. Pfizer & Co.*, 440 F. 2d 1079, 1090 (2d Cir.), *cert. denied sub nomine Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U. S. 871 (1971).

In the circumstances of this case at this stage individual notice is not required by due process.

(b) Individual Notice Is Not Required by Rule 23(c)(2).

Rule 23(c)(2) provides that: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." What is "practicable" and what constitutes "reasonable effort" are issues best left to the discretion of the District Court. It was stipulated in the District Court that the names and addresses of approximately 2,000,000 class members could be generated by comparing the records and tapes

of the odd-lot firms with the tapes of fourteen of the largest brokerage firms. Respondents agreed that: "such names and addresses will be made available (if plaintiff proceeds to give notice by individual mailing to such names and addresses) by defendants at their expense in the first instance with ultimate costs to abide the event, with court process under an appropriate order or orders." (A185). Respondents' willingness to undertake the obviously extraordinary effort of generating 2,000,000 names does not make the effort reasonable within the meaning of Rule 23(c)(2). Respondents gladly volunteered to perform an enormous task, because they hoped to abort the class action by imposing the prohibitive cost of individual notice on Petitioner. The Court of Appeals held that: "If identification of any number of members of the class can readily be made, individual notice must be given and Eisen must pay the cost. If this cannot be done, the case must be dismissed as a class action." Beguiled by Respondents' offer to generate the names, the Court of Appeals lost sight of the effort involved. It held, in effect, that whenever a defendant is willing to furnish names and addresses, regardless of the effort, plaintiff is saddled with the cost of individual notice, regardless of how prohibitive. Defendants in mass securities frauds or antitrust violations are thereby given the power to prevent any effective relief for their victims.

The language of the Rule requires no such rigid or impracticable result.[14] The notice ordered by the District Court was well within the bounds of its discretion. The court fairly devised the "best notice practicable under the

14. Even if the Rule could be read as the Court of Appeals has read it, ignoring the "effort" involved, Professor Miller has persuasively argued that it should not be given that interpretation. Miller, *op. cit., supra*, 58 F. R. D. at 320.

circumstances", combining notice by publication with selective individual notice designed to reach representative members of the entire class, as well as those members with the greatest stake.

(c) The Court of Appeals Failed to Consider Reasonable Alternatives for the Purpose of Satisfying Notice Requirements and Erred in Holding That Notice Is Required in 23(b)(1) or (2) Class Actions.

Judge Oakes' dissent expresses the view that individual notice to 2,000,000 class members is not required, and the Court's resolution of the issue "seems . . . inconsistent with the spirit of Rule 23, . . ." but that in any event, the class action should not have been dismissed without consideration of reasonable alternatives (A382).

> "The plaintiff class might, for example, be divided into much smaller subclasses, Fed. R. Civ. P. 23(c)(4)(B), of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified. See Kaplan, *supra,* 81 Harv. L. Rev. at 390-91; Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 438-54 (1960). . . .

Rule 23(c)(4) provides that: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

Another alternative would be to establish a class on the issue of liability, under Rule 23(b)(1) or (2), then, if Respondents are found liable, to proceed to determine damages under the aegis of a 23(b)(3) class. Rules 23(b)(1) and (2) permit a class action to be maintained where the requirements of 23(a) are satisfied,[15] and

> "(1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . ."

The Eisen class action fits into either 23(b)(1) or (2).[16] "[T]he requirements of Rule 23(b)(3) need not be met if the requirements of one of the other subsections of Rule 23 are met." *Amalgamated Workers Union of the Virgin Islands v. Hess Oil Virgin Islands Corp.*, 478 F. 2d 540, 543

15. The District Court found that the requirements of 23(a) were satisfied. The Court of Appeals did not reverse on that issue.

16. The complaint requests injunctive relief. Regarding the appropriateness of injunctive relief see pp. 50-52, *infra*.

(3d Cir. 1973). Rule 23 contains no requirement that notice must be given of a class action determination under (b)(1) or (2). In its 1968 opinion, the Court of Appeals erroneously held that (b)(1) and (b)(2) were not applicable, but in any event, notice was a requirement of due process in all class actions, including (b)(1) and (b)(2) actions, misreading *Hansberry v. Lee* and *Mullane v. Central Hanover Trust Co., supra.* In *Hammond v. Powell,* 462 F. 2d 1053, 1055 (4th Cir. 1972), the Fourth Circuit reached the opposite conclusion: "Furthermore, since this class action plainly comes within the ambit of F. R. Civ. P. Rule 23(b)(2), the notice requirement of Rule 23(c)(2) does not apply." The First Circuit agrees with the Fourth. *Yaffe v. Powers,* 454 F. 2d 1362, 1366 (1st Cir. 1972). *Cf. Amalgamated Workers Union of the Virgin Islands v. Hess Oil Virgin Islands Corp., supra.*[17]

Petitioner submits that the holding of the First and Fourth Circuits and the views of Professor Miller are correct; that the action may be maintained on the issue of liability under 23(b)(1) or (b)(2), and that the notice directed by the District Court more than satisfies the requirements

17. Professor Miller's view is that the *Eisen* decision is wrong on this issue; "that it fails to give sufficient weight to the mass quality of the class action; that the analogy occasionally drawn to the Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust Company* is not persuasive; and that most of the Supreme Court prounouncements concerning notice are distinguishable because they involve single plaintiff—single defendant litigation.

"Support for the position that notice to absent class members is not mandatory, is provided by the availability of other procedural safeguards. Before a class action can proceed, Rule 23(a) requires the Court to determine that the class is adequately represented. This prerequisite effectively satisfies the due process concerns that usually are reflected in a notice requirement. If the class representatives are found to have the qualities necessary to protect the interests of the other class members then those represented, in effect, have had a day in court under conditions that meet due process standards and notice is not constitutionally required." Miller, *op. cit., supra,* 58 F. R. D. at 314-5.

of due process. If liability is determined in favor of the class, it then would be entirely appropriate to proceed with a (b)(3) class action to determine on what formula damages should be computed and how such damages should be distributed. At that stage it would be feasible to consider massive individual notice, since Respondents would be liable for the costs. *Cf. Mills v. Electric Auto-Lite Co., supra; Partain v. First National Bank of Montgomery,* 59 F. R. D. 56, 62 (M. D. Ala. 1973).

IV. The Court of Appeals Erred in Holding That the District Court Was Without Authority to Allocate the Cost of Notice Between the Parties, on the Basis of a Preliminary Evidentiary Hearing on the Plaintiff's Probable Success on the Merits.

The plaintiff's financial ability to furnish notice to the class is not included in Rule 23 as a prerequisite to maintenance of a class action, or even as a factor to be considered in deciding whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Rule 23(c)(2), the only part of the Rule which requires the giving of notice, and which presupposes that an action has already been determined to be properly maintainable as a class action under 23(a) and (b), provides that the court shall direct notice to the class. It does not provide that the court shall direct the plaintiff to furnish the notice.

Numerous district court decisions have taken this to mean that it is proper to allocate the cost of notice between the parties. *Dolgow v. Anderson,* 43 F. R. D. 472 (E. D. N. Y. 1968); *State of Minnesota v. U. S. Steel Corp.,* 44 F. R. D. 559, 577 (D. Minn. 1968); *Bragalini v. Biblowitz,* 1969-1970 Fed. Sec. L. Rep. ¶92,537 (S. D. N. Y. 1969); *Berland v. Mack,* 48 F. R. D. 121 (S. D. N. Y. 1969); *Feder*

v. Harrington, 52 F. R. D. 178, 184 (S. D. N. Y. 1970); *Miller v. Alexander Grant & Co.*, 1971-72 Fed. Sec. L. Rep. ¶ 93,287 (E. D. N. Y. 1971); *Mack v. General Electric Co.*, Civil Action No. 69-2653 (E. D. Pa., Order of September 7, 1971); *Lamb v. United Security Life Company*, 1971-1972 Fed. Sec. L. Rep. ¶ 93,489 (S. D. Iowa 1972).

In *Berland v. Mack, supra*, Judge Mansfield (now on the Court of Appeals for the Second Circuit) stated:

> "[W]e do not believe that *Eisen* established a hard and fast rule to the effect that the plaintiff must initially lay out the cost of notice. We have repeatedly been advised that flexibility is important to the proper application of Rule 23, Green v. Wolf Corporation, 406 F. 2d 291, 299 (2d Cir. 1968), and that considerable freedom must be allowed the trial judge who is saddled with the burdensome task of managing the class action. The decision as to how the cost of notice is to be allocated between the parties appears to be an appropriate area for exercise of our discretion, having in mind the objective of enabling the class action device to be used effectively to prosecute a meritorious claim (instead of being foreclosed as too expensive) and at the same time restrained from being converted into a vehicle for harassment by frivolous claimants." 48 F. R. D. at 131.

The decision of the Second Circuit has now established the inflexible rule that allocation is not permissible and that a hearing to determine the propriety of allocation is not authorized by Rule 23.

Neither Respondents nor the panel questioned the right of the District Court to hold an evidentiary hearing to establish the ability to identify individual class members. Indeed, in its 1968 decision, the Court of Appeals directed the District Court to hold an "evidentiary hearing, with or

without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper." (A133). Rule 23(c)(2) provides that: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances . . . ." It is anomalous to hold that a hearing is proper on one aspect, i.e., what is the best notice practicable, but not on another interrelated aspect, i.e., on whom the burden of the court's direction should fall.[18]

Respondents were given a hearing on the cost of notice, with full opportunity to present evidence. No question of due process to Respondents is involved merely because, should they ultimately prevail, they may not succeed in recovering their costs. *Farmer v. Arabian American Oil Co.*, 285 F. 2d 720, 722 (2d Cir. 1960). Due process requires only the right to be heard. *Fuentes v. Shevin*, 407 U. S. 67 (1972). At such a hearing, plaintiff need only establish the probable validity of his claim. *Id.* at 97; *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 343 (1969) (Mr. Justice Harlan, concurring). Moreover, due process ". . . tolerates variances in the *form* of a hearing, 'appropriate to the nature of the case,' *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 313 . . . ." *Fuentes v. Shevin, supra*, 407 U. S. at 82.

Subjecting Respondents to the cost of notice does not differ in effect from requiring parties to make substantial

---

18. The Court of Appeals relied on the ruling by the Fifth Circuit in *Miller v. Mackey International, Inc.*, 452 F. 2d 424, 427-28 (5th Cir. 1971), for its conclusion that "the preliminary hearing on the merits was improper." On September 4, 1973, the Fifth Circuit, in banc, held that *Miller* did not foreclose preliminary hearings in class actions. *Huff v. N. D. Cass Company of Alabama*, 17 F. R. Serv. 2d 934 (5th Cir. 1973).

expenditures to comply with discovery orders,[19] or for the cost of defense,[20] or from attachments or preliminary injunctions, where the security posted may not be sufficient to cover the loss.[21]

V. The Court of Appeals Erred in Dismissing the Class as Unmanageable and Rejecting Out of Hand Any Possibility of Fluid Recovery.

(a) The Class Action Is Manageable.

The District Court found that the class action was manageable, analyzing the record in prior comparable cases, including the *Pfizer* case, *supra* (A205-6).[22]

The Court of Appeals in its prior opinion took particular note that: "Reference is made by Kalven & Rosenfield to the Illinois Bell Telephone Co. rate case where extensive litigation resulted in the actual distribution of about $17,000,000. Over 85% of the claims were for less than $25 and refunds were made to more than a million people. See Illinois Bell Telephone Co. v. Slattery, 102 F. 2d 58 (7th Cir.), cert. denied, 307 U. S. 648 (1939)."

By comparison, the cost of the initial notice found by the District Court in this case to satisfy due process and Rule 23(c)(2) was approximately $21,720. If liability and

---

19. See, *e.g., Hughes Tool Co. v. Trans World Airlines, Inc., supra.*

20. *See, e.g., Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F. 2d 649 (3d Cir. 1967) (Successful antitrust defendant may not recover his counsel fees from plaintiff).

21. See, *e.g., West v. Zurhorst, supra.*

22. As an example of a recent instance in which mass relief has been effectively administered, 6,682,084 Chevrolets were recalled on December 10, 1971, for a minor repair pursuant to 15 U. S. C. § 1402. U. S. Dept. of Transportation, *Motor Vehicle Safety Defect Recall Campaigns, from January 1, 1971 to December 31, 1971.* Over 2,000,000 automobile owners responded. Detroit News, November 1, 1972.

damage should be determined in favor of the class, the cost of more extensive notice to invite filing of claims under Rule 23(d), including the cost of mailing individual notices to the more than 2,000,000 identifiable class members, plus nationwide and foreign publication, and processing of claims, would be approximately $500,000, as against gross potential trebled damages to the 6,000,000 members of the class, estimated at a minimum of $22,000,000 and a maximum of $60,000,000.[23]

Without any basis in the record, and contrary to the findings of the District Court,[24] the Court of Appeals has now surmised that ". . . the costs of administration might run into the millions of dollars." (A354). Furthermore, the Court concluded that "notices by publication giving the essential information required by amended Rule 23 are a farce" and "it is fairly obvious that in cases like *Eisen* the expenses of giving the notices required by amended Rule 23 and the general costs of administration of the action would exceed the amount due to the few members of the class who filed claims and the individual members of the class would get nothing." (A369). Therefore, since the Court categorically rejected any pros-

23. The $60,000,000 estimate is fully corroborated by a document introduced by the defendants at the hearing on allocation of the cost of notice, the June 14, 1966 Report on Odd-Lot Operations and the Differential by the Special Committee to the Board of Governors of the Exchange (Defendants' Exhibit F). This maximum estimate is conservative. As noted in Defendants' Brief in the Court of Appeals (p. 13) a July 7, 1972 change in odd-lot floor procedures, which appears to implement cost-saving recommendations of Ebasco, a firm engaged in 1956 to study and make proposals for modernization of Exchange methods, has reduced the odd-lot differential even more drastically, resulting in a further saving estimated at $5 million annually. The District Court found that the Ebasco proposals were "unconsidered and unimplemented" throughout the period in litigation, although suggested to the Exchange in 1957 (A283-4). Accordingly maximum damages may be as much as $120 million.

24. The District Court's findings were vacated because the Court of Appeals held that it lacked authority to hold a preliminary hearing, not as "clearly erroneous".

pect of fluid recovery, the action was unmanageable and must be dismissed as a class action. In contrast, the First Circuit has stated: ". . . for a court to refuse to certify a class . . . because of vaguely-perceived management problems is counter to the policy which originally led to the rule, and more especially to its thoughtful revision, and also to discount too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise. *See* Committee's Criticism and Notes to Revised Rule 23, 3B Moore's Federal Practice ¶ 23.01 [8]-[13] (2d ed. 1969)." *Yaffe v. Powers, supra,* 454 F. 2d at 1365.

The Court of Appeals ignored the liability of Respondents to pay costs, if they are found liable. *Mills v. Electric Auto-Lite Co., supra; Partain v. First National Bank of Montgomery, supra; Bright v. Philadelphia-Baltimore-Washington Stock Exchange,* 327 F. Supp. 495, 506 (E. D. Pa. 1971). Thus, at the stage of the case where notice would be given to individual class members of their right to file proofs of claim for damages, the initial notice could be expanded upon, as the District Court contemplated would be done, at no expense to the class (A225, n. 12). Since fifty-six percent of the transactions of the class are preserved on computer records (A184-5), there is a fair likelihood that individual recoveries aggregating a substantial sum would be made, and effectively and economically administered, as in the Illinois Bell Telephone rate case and many others.

(b) Fluid Class Recovery Stands on Firm Legal Ground.

Just as the Court of Appeals characterized notice by publication as a farce, it dismissed the fluid recovery as a "fantastic procedure", which must be rejected "as an

unconstitutional violation of the requirement of due process of law." The Court has substituted rhetoric for reasoned analysis.[25] It ignores the fundamental character of the class action as a creature of equity. *Hansberry v. Lee, supra; Smith v. Swormstedt, supra; Montgomery Ward & Co., Inc. v. Langer,* 168 F. 2d 182, 187 (8th Cir. 1948). Equity has power to direct wrongdoers to disgorge the proceeds of their violations. *SEC v. Manor Nursing Centers, Inc.,* 458 F. 2d 1082, 1104 (2d Cir. 1972).

Professor Miller has written in favor of employing in the class action context "the same type of flexibility toward administering relief . . ." as traditionally exercised by courts of equity. "Accordingly, a federal court should feel free to experiment in awarding relief under Rule 23. It has the tools to shape the remedy to meet the exigencies of each case and difficulties in administration should not be allowed to destroy the usefulness of the class action procedure." Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3),* 54 F. R. D. 501, 511-12. This accords with the observation of the Chief Justice that: "Procedure should be tailored to need, not to some abstract standard." Report on the Federal Judicial Branch—1973, by Chief Justice Warren E. Burger, 59 A. B. A. Journal 1125, 1128

25. The Court unfortunately repeats the inflammatory phrase of Professor Handler that class actions are "legalized blackmail" and even dredges up a reference to "the old fashioned strike suits made famous a generation or two ago by Clarence H. Venner." Professor Handler is partisan. He is a senior member of a law firm actively representing in his private practice numerous antitrust defendants. For example, he used the "blackmail" argument as an advocate representing Texaco a defendant in a price-fixing class action, recently settled for $29,000,000. *City of Philadelphia v. American Oil Co.,* Civil Action No. 647-68 (D. N. J.). The blackmail spectre was raised, unsuccessfully in opposition to passage of the Clayton Act itself. 51 Cong. Rec. 16275 (1914). Private enforcement of the Antitrust and securities laws is intended to have a deterrent effect, and this Court has held that it is properly enhanced by class actions under Rule 23. See, *supra,* pp. 26-27.

(October 1973). ". . . [P]rocedural techniques . . . are the children of equity . . ." *Quinault Allottee Association & Individual Allottees v. United States,* 453 F. 2d 1272, 1274, n. 1 (Ct. Cl. 1972).

The Second Circuit itself had already approved the fluid class principle as an appropriate method of dealing with a class of millions of antitrust violation victims with small individual claims, in *State of West Virginia v. Chas. Pfizer & Co., supra.* One of the major issues on appeal in *Pfizer* concerned ". . . the propriety of permitting the states to recover through their attorneys general damages on behalf of individual consumers who have not themselves filed any claims." 440 F. 2d at 1089. The Court expressly approved that aspect of the settlement as follows:

> "We conclude, however, that the use of what might be termed the 'Book-of-the-Month-Club' procedure in these circumstances should be permitted. The notice stated that those not filing individual claims by a certain date would be assumed to be authorizing the state through its Attorney General to recover on their behalf. Presumably there were among this group some who read the notice and made an affirmative decision to assign their claims. Undoubtedly there were also those who did not receive notice, and it is with this group we should be concerned. Since under the revised rule those in a (b)(3) class who do not elect to opt out will be bound by the judgment, it is difficult to see how those who do not receive notice but on whose behalf damages are awarded to the state are in any way harmed by permitting the use of this procedure. To require those who wish to authorize the state to recover for them to affirmatively notify the court to this effect would obviously, as a practical matter, be likely to reduce the amount of these recoveries to a minimum." 440 F. 2d at 1091.

If Petitioner succeeds in establishing liability here, a prospect which the District Court has judged to be excellent, there is no reason why a notice program similar to that sustained in *Pfizer* with a comparable "assignment" technique, could not be utilized, informing the class that, to the extent that gross damages determined to have been sustained by the class as a whole were not claimed by individual class members, they would be deemed to have been assigned for the benefit of future odd lot customers. Equity would be well served by such a procedure, as would the public policy of the antitrust and securities laws.

Conceptual difficulties concerning the right to recover damages under Section 4 of the Clayton Act, 15 U. S. C. § 15, can be dealt with as they were in *Pfizer*. While Section 4 speaks of recovery by persons injured in their business or property, it does not spell out what such persons must do with their recovery once liability is established, nor does it prevent them from assigning or otherwise disposing of their interests. A finding of liability would establish that every member of the class was injured during the period in suit by being compelled to pay the odd-lot differential fixed in violation of the antitrust laws. Adoption of the *Pfizer* technique would have the virtue of assuring that Respondents do not keep their ill-gotten gains, an objective with which this Court expressed its full accord in *Hanover Shoe Co. v. United Shoe Machinery Corp., supra,* 392 U. S. at 494. See also *SEC v. Golconda Mining Co.,* 327 F. Supp. 257 (S. D. N. Y. 1971).

In *Eisen* the overcharge was paid directly by the plaintiff class. That class alone is in a position to make sure that the defendants do not "retain the fruits of their illegality."[26] Each and every member of the *Eisen* class is a

26. Even where there are competing classes, the Courts are able to fashion relief to the end that "there be no hiatus in the enforcement" of the antitrust law. . . . Where the choice is between a windfall to intermediaries or letting guilty defendants go free liability

person injured in his business or property, within the literal wording of Section 4 of the Clayton Act, 15 U. S. C. § 15, and each and every one is directly injured, so that in computing damages for the class as a whole, and applying the *Pfizer* technique for distribution, the court would be carrying out the statutory intent that those injured are entitled to recover. *Cf. In Re Antibiotic Antitrust Actions,* 333 F. Supp. 278, 287-9 (S. D. N. Y. 1971), *mandamus denied,* 449 F. 2d 119 (2d Cir. 1971).

The concept of a fluid class recovery has received wide approval from the courts in analogous situations. In *Bebchick v. Public Utilities Commission,* 318 F. 2d 187 (D. C. Cir., in banc), *cert. denied,* 373 U. S. 913 (1963), millions of bus riders in Washington, D. C., had been overcharged a nickel on their fare over an eleven month period. Defendants argued that the case should be dismissed because there was no feasible way to return such small sums to so many people, who could not be readily identified. The Court of Appeals refused to let the wrong-doer keep the illegal overcharge, holding:

> "It is not feasible to require refunds to be made to individuals who paid the increase. Nevertheless, the amount realized by Transit from the increase must be utilized for the benefit of the class who paid it, that is, those who use Transit. To accomplish this Transit will be required to establish a fund in an amount equal to the 5 cent increase collected during the specified period, in other words, $\frac{5}{25}$ or 20 per cent of the total cash fares collected." 318 F. 2d at 203-04.

The court thus required the company to pay for the benefit of future riders damages sustained by past riders, even

---

26. (Cont'd.)
is imposed." *In Re Western Liquid Asphalt Cases,* 1973 CCH Trade Cases, ¶ 74,733 (9th Cir. 1973), at p. 95,220-21. "To permit so large a fish to escape the nets is unthinkable." Id. at p. 95,219.

though the two classes would not be identical since some riders would cease to use transit, and new riders would replace them. The same kind of remedy was contemplated by Petitioner's suggestion here ". . . that a fund equivalent to the amount of the unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted."

The courts reached the same result in *Market Street Railway Co. v. Railroad Commission,* 28 Cal. 2d 363, 171 P. 2d 875 (1946) (where the overcharge was one penny a ride); *Olson v. The County of Sacramento,* 79 Cal. Rep. 140, 145 (Cal. Ct. App., 3d Dist. 1969); *Alaska Steamship Co. v. Federal Maritime Commission,* 344 F. 2d 810, 815 n. 4 (9th Cir. 1965); and *Daar v. Yellow Cab Co.,* 67 Cal. 2d 695, 433 P. 2d 732 (1967).

In *Metro Homes, Inc. v. City of Warren,* 19 Mich. App. 664 (1969), *leave to appeal denied,* 383 Mich. 761, *cert. denied,* 398 U. S. 959 (1970), a class action, it was held that the class was entitled to restitution of money collected under an unconstitutional ordinance. The trial court ordered the full amount collected be paid into Court. On appeal, the defendants urged that the judgment be modified to require payment into Court of only those funds for which an individual claim was filed within three to six months after notice was given. Their argument was rejected, as follows:

> "We believe that the present judgment best serves the interests involved here. Regardless of the mechanics of distribution, the judgment in this class action conclusively determines the city's liability to each member of the class. See *International Typographical Union v. County of Macomb* (1943), 306 Mich. 562. Consequently, no apparent purpose is served by making the filing of a claim a condition of recovery. The difficulty

with the defendants' proposed modification is that the city should not be permitted to retain any part of the unconstitutionally gained funds." 19 Mich. App. at 674-5.

Shareholder derivative suits frequently reach the "fluid class" result by indirection, since to the extent that shares are transferred during the litigation the shareholders who reap the benefit may not be the same ones who incurred the loss. As an extreme example, in *Perlman v. Feldman,* 129 F. Supp. 162 (D. Conn. 1952), *rev'd,* 219 F. 2d 173 (2 Cir. 1955), *on remand,* 160 F. Supp. 310 (D. Conn. 1958), the ultimate recovery went to a new owner who had purchased more than 95% of the shares subsequent to the wrongs complained of. See Moody's Industrial Manual (1955), p. 2646.

(c) Fluid Class Recovery Is a Legally Sound Remedy for Violation of the Exchange Act.

Liability of the Exchange is predicated on federal common law, and recovery thereunder is not limited to persons defined by statute. "It is well established that members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach and that the common law will supply a remedy if the statute gives none." *Baird v. Franklin,* 141 F. 2d 238, 245 (2d Cir.), *cert. denied,* 323 U. S. 737 (1944). "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' . . ." *J. I. Case Co. v. Borak,* 377 U. S. 426, 433 (1964). *Accord, Bivens v. Six Unknown*

Named Agents of Federal Bureau of Narcotics, 403 U. S. 388, 397 (1971).

This plenary power to fashion federal remedies for violations of the Exchange Act is not limited by any statutory equivalent of Section 4 of the Clayton Act. The full panoply of relief is available, unrestricted by technical concepts of injury to business or property. Requiring the Exchange to pay damages on a "fluid recovery" basis, such as that approved by the Second Circuit in *Pfizer,* would be in accord with the principles of equity, and within the scope of remedies to be fashioned under *J. I. Case v. Borak, supra.*[27]

The Court of Appeals simply did not come to grips with this argument. Briefly restating it, the Court dismissed it without analysis by saying: "We find no helpful analogy in the procedures that have been used for generations in connection with preliminary injunctions or other provisional remedies intended to preserve the *status quo",* a curious reading of such cases as *J. I. Case v. Borak, supra.*

The equitable powers of the court to fashion an effective remedy under the Exchange Act for the Exchange's breach of its fiduciary duties to investors are fortified by the origin of the class suit as ". . . an invention of equity . . ." *Hansberry v. Lee, supra; Smith v. Swormstedt, supra; Montgomery Ward & Co., Inc. v. Langer, supra,* 168 F. 2d at 182.

---

27. While the Exchange did not itself receive the illegally exacted odd-lot differential, its breach of its statutory fiduciary duty was instrumental in making its exaction possible. In *Dickinson v. Burnham,* 197 F. 2d 973 (2d Cir.), *cert. denied,* 344 U. S. 875 (1952), the Court held both wrongdoers jointly and severally liable for the consequences of their acts although each had retained only one half of the funds. Similarly, in *S. E. C. v. Texas Gulf Sulphur Co.,* 446 F. 2d 1301 (2d Cir.), the Court held a defendant liable for restitution of profits by his tippees.

Under established principles of equity the District Court was right in regarding as "crucial . . . the ability of the court to fashion a remedy, relying on its own and counsel's ingenuity, where a wrong has been done and where the consequences of not fashioning a remedy would permit avoidance of appropriate sanctions and the retention of illegal profits." (A215-6).

(d) Fluid Recovery Is Appropriate Under Section 16 of the Clayton Act.

The complaint includes a prayer for injunctive relief. Such relief is authorized by Section 16 of the Clayton Act, 15 U. S. C. § 26, which provides for injunctive relief under the antitrust laws.

". . . [T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws . . . Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co. v. Bowles,* 321 U. S. 321, 329-330, 88 L. Ed. 754, 760, 761, 64 S. Ct. 587 (1944). Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect.' *Id.* at 330, 88 L. Ed. at 761." *Zenith Radio Corp. v. Hazeltine Research, Inc. supra,* 395 U. S. at 131. See also, *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.,* 351 F. Supp. 1153, 1209 (D. Hawaii 1972). Taking the profit out of monopoly by allowing a "fluid recovery" of the illegal overcharge is as appropriate as ordering divestiture to restore competition. "The relief in an antitrust case must be

'effective to redress the violations'' . . . *Ford Motor Co. v. United States,* 405 U. S. 562, 573 (1972).

Existence of the statutory treble damage remedy does not bar equity from affording comparable relief, including compelling restitution of illegal exactions. This Court so held under the analogous statutory scheme of the Emergency Price Control Act in *Porter v. Warner Holding Co.,* 328 U. S. 395 (1946). Speaking of the powers of equity, the Court stated: ". . . since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . . . the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice . . . . It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents or property acquired in violation of the . . . Act may properly be entered by a District Court once its equity jurisdiction has been invoked under § 205(a)." 328 U. S. at 398-9. *Cf. Jordan v. Weaver,* 472 F. 2d 985 (7th Cir. 1973), *cert. granted sub nom. Edelman v. Jordan,* 37 L. Ed. 2d 396.

VI. The Court of Appeals Has Unjustifiably Limited the Discretion of the District Court.

Rule 23 entrusts the District Court with broad discretionary powers which the decision of the Court of Appeals has abrogated. The fundamental fallacy which permeates its whole opinion, is lucidly exposed by analyses of the Third and Tenth Circuits. In *Katz v. Carte Blanche Corporation,* — F. 2d —, 17 FR Serv. 2d 279 (3d Cir. 1973) (Petition For Rehearing In Banc granted, June 20, 1973),

the Court held that "great deference" should be given a District Court's class determination, stating the issues on appeal as follows:

> "(1) the standard to be applied . . . in reviewing the district court's pretrial grant of the class action; and
>
> (2) under that standard, whether the district court erred in granting the motion."

Under Rule 23 the district court retains discretion to modify its class action determination at any time before a final decision on the merits. The Third Circuit held that:

> "The district court's opportunity to review its own decision throughout the proceeding is part of the scheme in Rule 23 to vest broad discretion in the district court when dealing with class actions. Clearly, this broad discretion is essential if the court is to cope with the problems inherent in managing a class suit. Consequently, where the district court has granted a pretrial motion to proceed as a class, and where immediate appellate review of that order has been permitted, we conclude the appellant must make a convincing showing that the district court committed an abuse of discretion in granting the motion. Only, then will this court intercede."[28]

The Court of Appeals for the Tenth Circuit has manifested the same view, albeit in affirming disallowance of a

28. ". . . whether there should be individual notices or whether notice by publication may be satisfactory should, in the absence of an abuse of discretion, be a matter for the district court. Notice to members of a class can involve many considerations, and the district court has the advantage of being on the scene and aware of all the countervailing factors." *Greenfield v. Villager Industries, Inc.*, 483 F. 2d 824, 836 (3d Cir. 1973) (Opinion of Judge Adams, dissenting from denial of rehearing in banc).

Truth-in-Lending class action. *Wilcox v. Commerce Bank of Kansas City*, 474 F. 2d 336 (10th Cir. 1973). The Court regarded as the "seemingly most sensible alternative" that ". . . trial courts be permitted in the exercise of sound discretion to determine within broad and open-ended guidelines whether . . . [class action treatment] is superior to other available methods for the fair and efficient adjudication of the controversy on a case by case basis." 474 F. 2d at 348. Further, the Court stated: "We believe that the solution may well be to continue straight ahead for a time under the present Rule, but to smooth out to a degree the formal obstacles that may be unduly obstructing trial courts on the firing line in realistic and practical applications within their sound discretion and in view of superior opportunity to observe the battle conditions case by case." Id. at 349.

Rule 23(c)(2) provides that: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort . . . ." What is "the best notice practicable" and what constitutes "reasonable effort" are plainly determinations which lie within the sound discretion of the District Court. Likewise, "fluid recovery" was not inflexibly adopted by the District Court, to the exclusion of individual claims. Indeed, 56 percent of the odd-lot transactions on the Exchange were recorded on computer tapes and could clearly form the basis for individual recoveries (A184-5).

The Court Appeals in *Eisen* erred in inflexibly holding that there is no area within which the District Court's discretion may operate.

CONCLUSION.

The May 1, 1973 decision of the Court of Appeals should be reversed, with directions to reinstate the District Court's orders of April 7, 1971 and April 4, 1972.

Respectfully submitted,

MORDECAI ROSENFELD,
233 Broadway,
New York, New York. 10007
HAROLD E. KOHN,
AARON M. FINE,
ALLEN D. BLACK,
ARTHUR M. KAPLAN,
1214 IVB Building,
1700 Market Street,
Philadelphia, Pennsylvania. 19103
Attorneys for Petitioner.

APPENDIX TO PETITIONER'S BRIEF.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS.

15 U. S. C. § 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 U. S. C. § 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

15 U. S. C. § 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

15 U. S. C. § 26.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction

improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

15 U. S. C. § 78(f).

(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this chapter, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, un-

less the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.
June 6, 1934, c. 404, § 6, 48 Stat. 885.

15 U. S. C. § 78aa.

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and

decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.
June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

28 U. S. C. §§ 1291 and 1292(b).

§ 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

§ 1292. Interlocutory decisions.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order:

Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-949, 72 Stat. 1770.